

STATE OF MICHIGAN
COURT OF APPEALS

FRED A. LAWNICKI,

Plaintiff/Counter-Defendant-
Appellant,

v

TELMARK, LLC,

Defendant-Appellee,

and

WELLS FARGO FINANCIAL LEASING, INC.,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

September 19, 2006

No. 268184

Wayne Circuit Court

LC No. 04-425628-CZ

Before: Whitbeck, P.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

In this action for damages and to enjoin foreclosure, plaintiff appeals as of right the trial court's order setting the amount for redemption and denying reconsideration of an earlier order granting summary disposition in favor of defendants Telmark, LLC (Telmark) and Wells Fargo Financial Leasing, Incorporated. We affirm.

This case arises from a "Lease Purchase Agreement" and mortgage involving real property owned by plaintiff. After plaintiff defaulted on his obligations under the agreement, defendant Wells Fargo exercised its right to accelerate the remainder of all payments due under the lease agreement and foreclose against the property. Plaintiff thereafter brought the instant suit to enjoin the foreclosure and for damages, against which defendants asserted a counterclaim for breach of contract. On cross-motions for summary disposition the trial court granted summary disposition in favor of defendants. The court subsequently set redemption at \$160,346.61, the balance determined by the trial court to be owing under the parties' agreement.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Although the trial court did not indicate under which subrule it found defendants to be entitled to summary disposition, it is clear that the court reviewed matters outside the pleadings in reaching its decision. Accordingly,

review under MCR 2.116(C)(10) is appropriate. See *Spiek v Dep't of Transportation*, 456 Mich 331, 337-338; 572 NW2d 201 (1998). When seeking summary disposition under MCR 2.116(C)(10), the moving party must specifically identify the matters which have no disputed factual issues, *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence, *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Id.* If the evidence submitted demonstrates that there is no genuine issue of material fact for trial, summary disposition of the matter is appropriate. *Spiek, supra* at 337.

On appeal, plaintiff argues that summary disposition in favor of defendants was improperly granted because the trial court failed to properly credit him with payments made under the parties' agreement. Specifically, plaintiff argues that if the transaction involved was, as acknowledged by the trial court, a loan, then he is entitled to receive full credit against the principal amount of the loan for payments made—relief not afforded to him by the trial court. In making this argument, plaintiff cites *Albers v Bradley*, 321 Mich 255, 262-264; 32 NW2d 454 (1948), for the proposition that courts must examine the conduct of the parties to determine the true nature and intent of a transaction respecting real property. Our Supreme Court has, however, more recently recognized that:

[a] fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*. Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. This Court has previously noted that the general rule of contracts is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.

When a court abrogates unambiguous contractual provisions based on its own independent assessment of “reasonableness,” the court undermines the parties’ freedom of contract. [*Rory v Continental Ins Co*, 473 Mich 457, 468-469; 703 NW2d 23 (2005) (footnotes and internal quotation marks omitted).]

Thus, the Court held that where contractual language is not ambiguous, the terms of the agreement must be enforced as written unless to do so would violate law or public policy. *Id.* at 470. Here, plaintiff does not allege that the contractual language concerning the amount owing upon early termination or default of the parties' agreement is ambiguous. Nor does he dispute that the amount calculated under such terms is properly equal to the amount asserted by defendant, and found by the trial court, to be owing by him under the agreement. Rather, plaintiff argues, in essence, that the agreement should be judicially construed to comport with what he asserts to be the true nature of the transaction, as intended by the parties. However, in *Rory, supra* at 470, the Court held that “[o]nly recognized traditional contract defenses may be used to avoid the enforcement” of an unambiguous contract provision. And although these

defenses include such matters as fraud, *id.* at 470 n 23, and usury, see MCL 438.31, plaintiff fails to assert any error by the trial court in dismissing these theories, on which plaintiff relied in seeking injunctive and monetary relief from the transaction at issue.¹ See *Three Lakes Ass'n v Whiting*, 75 Mich App 564, 579; 255 NW2d 686 (1977) (it is an appellant's burden to establish error requiring relief on appeal). Accordingly, we find no error in the trial court's grant of summary disposition in favor of defendants without having addressed or otherwise afforded plaintiff credit for his payments in the manner asserted on appeal. See *Wagar v Peak*, 22 Mich 368, 370 (1871) (this Court "must presume that the rulings of the trial court were correct, in the absence of any thing showing them to be wrong"). Indeed, plaintiff has failed in his burden of advancing any issue upon which this Court might reverse the trial court's determination on summary disposition. *Id.*; *Three Lakes*, *supra*.

Plaintiff also argues that the trial court erred in failing to find the lending transaction unconscionable. Plaintiff asserts that the documentation prepared by defendants, specifically the Lease Purchase Agreement, was intended to provide defendants with the benefit of foreclosure on the property, while at the same time precluding plaintiff from receiving credit for any payments he made on the loan. Thus, plaintiff argues, the financing transaction entered into between himself and defendants should have been ruled by the trial court to be unconscionable. Although unconscionability constitutes a traditionally recognized defense that would preclude enforcement of an unambiguous contract, see *Rory*, *supra*, we disagree with plaintiff's assertion that the trial court erred in failing to find the transaction at issue unconscionable.

It is well settled that an issue is not properly preserved if it is not raised before and addressed by the trial court. *Phinney v Perlmuter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). Although in arguing for summary disposition counsel for plaintiff referenced his belief that the transaction at issue was unconscionable, he failed to specifically request that the trial court consider unconscionability as an argument upon relief could be granted until moving for reconsideration. The trial court, however, was not obligated at that point to consider the issue of unconscionability. See *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987) (a trial court does not abuse its discretion by refusing to consider legal arguments raised for the first time on motion for reconsideration). Accordingly, plaintiff cannot assign error to the trial court's failure to address the matter.

In any event, the record in this matter does not support a finding of unconscionability. "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Allen v Michigan Bell Telephone Co*, 18 Mich App 632, 637-638; 171 NW2d 689 (1969) (citation and internal quotation marks omitted). Here, there is no evidence that plaintiff lacked any meaningful choice other than to accept the terms and structure of the financing transaction proposed by defendants. Consequently, we conclude that the trial court did not err in failing to find the parties' agreement unconscionable.

¹ In fact, plaintiff specifically states in his brief that he is "not appealing the [t]rial [c]ourt's determination on the usury issue."

Affirmed.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder